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## WORKERS ON THE MARCH: WORK STOPPAGES, PUBLIC RALLIES, AND THE NATIONAL LABOR RELATIONS ACT

Rachael M. Simon<sup>+</sup>

On April 10, 2006, masses of immigrants and their supporters took to the streets of cities and towns across the United States.<sup>1</sup> While hundreds of thousands of demonstrators crowded the National Mall in Washington, D.C., roughly 100,000 protestors assembled at the Arizona Capitol, untold thousands filled the streets around New York's City Hall, and many other gatherings occurred throughout the country.<sup>2</sup> The participants in these rallies sought to draw national attention to the size of the immigrant community in the U.S. and express support for comprehensive immigration reform.<sup>3</sup> Another day of demonstrations, dubbed the "Day Without Immigrants," occurred a few weeks later, on May 1, 2006.<sup>4</sup> As

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1. E.g., Dan Balz & Darryl Fears, *We Decided Not to Be Invisible Anymore*, WASH. POST, Apr. 11, 2006, at A1.

2. *Id.*

3. See *id.* ("The rallies signaled that the passions of the immigrant community, which wants Congress to approve comprehensive immigration reform that includes a path to citizenship, are as intense as they are for those whose opposition to illegal immigrants helped put the issue on the national agenda."). Both the House and the Senate have proposed immigration reform bills. See *Immigration Bills Compared: Highlights of the House and Senate and Border Security Measures*, WASH. POST, June 17, 2007, <http://www.washingtonpost.com/wpdyn/content/custom/2006/05/26/CU2006052600148.html> (outlining the House and Senate immigration bills). The House bill is focused on strict enforcement and includes provisions for a border fence, mandatory detention at ports of entry, and increased employer sanctions. *Id.* Most controversially, the proposed House bill makes illegal presence in the U.S. a felony offense. *Id.* The proposed Senate bill includes enforcement provisions, but it also increases the number of work visas, creates a guest worker program, and includes a path to citizenship for undocumented people currently in the U.S. *Id.*

4. See Gillian Flaccus, *1M Immigrants Skip Work for Demonstration*, WASH. POST, May 2, 2006, [http://www.washingtonpost.com/wp-dyn/content/article/2006/05/01AR2006050100151\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/05/01AR2006050100151_pf.html); see also Brad Lendon, *U.S. Prepares for 'A Day Without an Immigrant'*, CNN, Apr. 28, 2006, <http://www.cnn.com/2006/US/04/28/boycott/>; Sarah Ferguson, *No Justice, No Work: Immigrants Tap May Day's Radical Roots*, THE VILLAGE VOICE, Apr.

indicated by the name, organizers planned the May 1 demonstrations to show what America would be like without immigrants and to highlight the economic power of the immigrant community as both workers and consumers.<sup>5</sup> Organizers called for participants to engage in a large-scale work boycott, refrain from spending money, and attend the immigration reform rallies.<sup>6</sup>

These national protests and boycotts not only sparked debate across the national political landscape and within the immigrant community,<sup>7</sup> but also raised complicated labor issues in places of employment around the country.<sup>8</sup> A major element of the immigration protests was a nationwide work boycott.<sup>9</sup> Some employees asked for the day off ahead of time, others worked extra hours or switched shifts in order to make up

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28, 2006, <http://www.villagevoice.com/news/0618,ferguson,73040,6.html>. Strike organizers selected May 1 as the date of the protest because of its significance as International Workers Day, which marks the establishment of the eight-hour work day. Ferguson, *supra*.

5. See Flaccus, *supra* note 4 ("The boycott was organized by immigrant activists angered by federal legislation that would criminalize the nation's estimated 11 million illegal immigrants and fortify the U.S.-Mexico border. Its goal was to raise awareness about immigrants' economic power.").

6. See *id.*; Ferguson, *supra* note 4. Some local labor unions involved in organizing the demonstrations did not advocate the planned work boycott on May 1. Ferguson, *supra* note 4. Rhadames Rivera, the vice president of a New York healthcare union that is affiliated with Service Employees International Union, said that the union supported a consumer boycott for the day but would not encourage a work stoppage. *Id.* She stated, "[T]o call on our lowest-income workers not to go to work would be inappropriate at this time." *Id.*

7. See Ferguson, *supra* note 4. The May 1 work boycott was a tactic debated within the activist community:

Some activists say ditching work or staying home from school will just put immigrants and their families further at risk—a serious concern considering U.S. Immigrations and Customs agents rounded up nearly 1,200 undocumented workers last week. Others fear that work stoppages and boycotts will cast immigrants as anti-American and anti-business, alienating the very lawmakers they need to win over.

*Id.* (emphasis omitted); NewsHour Extra, *Schools and Businesses Brace for 'Day Without Immigrants'*, PBS, Apr. 28, 2006, [www.pbs.org/newshour/extra/features/jan-june06/boycott\\_4-28.html](http://www.pbs.org/newshour/extra/features/jan-june06/boycott_4-28.html) (describing some critics of the planned May 1 work boycott who feared it could "lead to further anti-immigration backlash among politicians and Americans in general"). Gustavo Torres, the executive director of an immigrant rights organization, cautioned: "We support [a boycott], but not right now because we believe right now the ball is in the hands of the Senate." NewsHour Extra, *supra* (alteration in original).

8. See Lornet Turnbull, *Boycott by Immigrants: How Big Will Ripple Be?*, SEATTLE TIMES, Apr. 27, 2006, [http://seattletimes.nwsources.com/html/localnews/2002955886\\_immigrantmarch24m.html](http://seattletimes.nwsources.com/html/localnews/2002955886_immigrantmarch24m.html). Some examples of businesses that were affected by the work boycotts include: restaurants, construction companies, vegetable growers, hotels, and schools. *Id.*; see also Jeff Jurkens, *The Fox and the Hedgehog: A Lesson in Immigration and Handling the Press*, PROFESSIONAL CAR CARE ONLINE, <http://www.carwash.com/article.asp?indexid=6636335> (last visited July 12, 2007) (discussing the carwash industry's heavy reliance on immigrant workers).

9. See Flaccus, *supra* note 4.

the time, while another group of employees simply did not show up to work.<sup>10</sup> Some employers in industries that depend heavily on immigrant labor, such as the Tyson and Perdue meat processing plants, closed in advance of the planned rallies because of expected labor shortages, while other businesses closed early after employees did not come to work.<sup>11</sup> Although some employers reacted to the boycott by expressing solidarity with their immigrant employees,<sup>12</sup> many others responded with frustration and threats of reprisal.<sup>13</sup> A restaurant owner reacted angrily to the impending work boycott, saying, "I told them I'd terminate them . . . . If they strike, they'll shut me down. I'm loyal to them, giving them two

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10. See *id.*; Greg Gross, *Immigration Boycott Felt Around County*, SAN DIEGO UNION-TRIBUNE, May 1, 2006, <http://www.signonsandiego.com/news/metro/20060501-1612-bn01protest8.html> (reporting on how the boycott played out in the cases of several San Diego area employers). Some employers said that most of their immigrant employees had either requested to be off the work schedule on May 1 or had alerted the employer that they would be absent that day. Gross, *supra*. In other cases, the immigrant workers worked over the weekend to make up for missing work on Monday, May 1. *Id.*

11. See Flaccus, *supra* note 4; Ferguson, *supra* note 4 ("[M]any workers will protest with their employers' blessing: In the past week, nine meatpacking plants and 120 produce distributors have announced they're shutting down on May 1."); Gross, *supra* note 10.

12. See Kim Vo, *Thousands Expected at S.J. Rally*, SAN JOSE MERCURY NEWS, Apr. 29, 2006, at 1A; see also Lendon, *supra* note 4 (noting that the meatpacking corporation Cargill gave 15,000 workers May 1 off from work so they could participate in the immigration demonstrations). Jeff Jurkens, the CEO of Octopus Car Wash's Midwest operations wrote the following message on the company's website:

It is not at all unusual to find a Latino employee with five years or better tenure in our firm. Therefore, keeping with the culture of Octopus, we took this situation [immigration reform rallies] seriously and wished to make it possible for our interested employees to attend this rally.

As a result, we: [(1)] Wrote and disseminated a written bilingual policy; [(2)] Encouraged all that wished to attend to do so; [(3)] Made it abundantly clear we were very sympathetic to their plight and cause; [(4)] Required only that those wishing to attend must cover their positions while attending [, and i]f a worker had any problems doing so, we advised him to ask for assistance; and [(5)] Advised the staff that anyone scheduled to work that day that did not, without prior arrangement, would be considered "no call, no show."

Jurkens, *supra* note 8. In addition, California lawmakers passed a resolution of support for the immigration rallies and the boycott. Lendon, *supra* note 4.

13. See Vo, *supra* note 12, at 15A; Gross, *supra* note 10. One employer, Alejandro Gonzalez of Vista Catering, who owns a fleet of seventeen lunch vans, and "had only six of his 32 employees show up for work Monday, despite promising them a full day's pay for even a half day of work" responded by saying "[t]here's definitely going to be firings." Gross, *supra* note 10. Also, eight restaurant employees were fired after they missed work in order to attend an immigration rally and four other employees quit in protest. Jason Kobely, *Tracy Chevy's Employees Fired Over Immigration Work Boycott*, NEWS10, May 4, 2006, <http://www.news10.net/storyfull2.aspx?storyid=17402>. The discharged employees reported that they had asked for the day off in advance, but were told that they would be fired if they missed work. *Id.* The company said that the employees were fired "for failing to request permission to take the day off" and not because they participated in the rallies. *Id.*

weeks off if they have a baby or something, and that's not showing loyalty if I've got \$30,000 in lost business.”<sup>14</sup>

As evidenced by an April 29, 2006 memorandum published by the General Counsel of the National Labor Relations Board (“Board” or “NLRB”), there were at least several incidences where employers disciplined employees because they ceased work in order to attend the immigration rallies.<sup>15</sup> In the memorandum, the Associate General Counsel stated: “Unfair labor practice charges have been filed in several Regional Offices involving allegations arising out of employer discipline of employees because of their attendance during work time at public rallies concerning national immigration policy.”<sup>16</sup> These unfair labor practice charges rest upon the argument that a work stoppage to attend an immigration reform rally is protected “concerted activity” for “mutual aid or protection” within the meaning of section 7 of the National Labor Relations Act (“the Act” or “NLRA”), and therefore, any employer discipline based on this employee activity would be unlawful as an unfair labor practice.<sup>17</sup>

Section 7 of the NLRA guarantees employees the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>18</sup> Section 8(a)(1) of the Act makes it unlawful for any employer to “interfere with, restrain, or coerce employees in the exercise of” their section 7 rights.<sup>19</sup> In light of the unfair labor practice charges filed with the NLRB, the key question for consideration is whether an employee’s participation in a work stoppage to attend an immigration reform rally qualifies as protected concerted activity under section 7.<sup>20</sup>

This is a difficult question to answer, notwithstanding years of Board and court decisions that have defined and redefined what types of employee activities are protected by section 7.<sup>21</sup> But the question is impera-

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14. Vo, *supra* note 12, at 15A.

15. Memorandum from Richard A. Siegel, Associate General Counsel, NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers (Apr. 28, 2006), *available at* [http://www.nlr.gov/shared\\_files/OM%20Memos/2006/OM%2006-65%20Cases%20Arising%20Out%20of%20Immigration%20Rallies.pdf](http://www.nlr.gov/shared_files/OM%20Memos/2006/OM%2006-65%20Cases%20Arising%20Out%20of%20Immigration%20Rallies.pdf) [hereinafter Siegel memo].

16. *Id.*

17. See 29 U.S.C. § 157 (2000); *see also* Siegel memo, *supra* note 15; Press Release, Change to Win, Change to Win Helps Uphold Immigrant Workers’ Rights (Aug. 9, 2006), *available at* <http://www.changetowin.org/for-the-media/press-releases-and-statements/change-to-win-helps-uphold-immigrant-workers-rights.html>.

18. 29 U.S.C. § 157.

19. 29 U.S.C. § 158(a)(1) (2000).

20. See 29 U.S.C. § 157.

21. See discussion *infra* Parts I-II.

tive as changes in the American labor force<sup>22</sup> and the decline in the power of the traditional strike only increase the need to resolve the issue of what employee activities are covered under the Act.<sup>23</sup> As membership in labor unions declines<sup>24</sup> and immigrant participation in the American workforce increases,<sup>25</sup> planned work stoppages and national rallies may

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22. See LUKE J. LARSEN, U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003 5 (2004) (explaining that immigrant workers are now more likely than native-born Americans to be in service occupations and other fields that have traditionally been unionized); Press Release, Bureau of Labor Statistics, Union Members in 2006 (Jan. 25, 2007), available at <http://www.bls.gov/news.release/pdf/union2.pdf> (stating that the percentage of the American workforce that is unionized is declining).

23. Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 353 (1994) (discussing how "the potency of the strike has been annihilated" since the NLRA was enacted). Becker argues that economic factors such as recession, declining union membership, and the growing number of salaried employees have eroded the use of the strike. *Id.* He also states that "[t]he right to strike has been gutted by the federal courts and the National Labor Relations Board." *Id.* The right to strike, Becker argues, has been weakened by court decisions that have announced two rules of law that have proven detrimental to the employee's ability to strike: (1) the employer's right to permanently replace strikers; and (2) the lack of NLRA protection for non-traditional employee strike activity, such as sit-downs, slowdowns, partial strikes, and intermittent strikes. *Id.* at 353-55. In this article, Becker advocates the extension of NLRA protection to "repeated grievance strikes," where the employees may engage in a brief work stoppage to protest a specific work-related problem. *Id.* at 355.

24. See Bureau of Labor Statistics, *supra* note 22. This report indicates that 12 percent (15.4 million) of American workers were unionized in 2006. *Id.* This number represents a decrease from a high of 20.1 percent of American workers in 1983, which was the first year that such data was available. *Id.*; see also Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL L. REV. 1767, 1768 n.3 (2001) (stating that while unions represented one third of all wage and salary workers in the 1950s, only 13.5% of American wage and salary workers were unionized by 2000).

25. See generally LARSEN, *supra* note 22. According to the U.S. Census Bureau, foreign-born workers are more likely to be in "service occupations," while native workers were more likely to be in "management or professional specialty occupations." *Id.* at 5. In addition, foreign-born workers are more often employed in "production, transportation, and material moving occupations" or "construction, extraction, or maintenance" occupations than native-born Americans. *Id.* at 5 & n.12. Comparatively, native-born workers are more likely to be in "sales- or office-related occupations." *Id.* at 5 n.12. In terms of income, the report states that 30.5 percent of foreign-born, full-time, year-round workers and 16.5 percent of native workers earned below \$20,000. *Id.* at 7. Of these foreign-born workers earning less than \$20,000 annually, 41% are from Latin America while 16.5% are from Europe. *Id.* Finally, the report states that "[f]oreign-born noncitizens were twice as likely to be poor as foreign-born naturalized citizens." *Id.* Of the foreign-born populations, people from Latin America demonstrated the highest poverty rates, while those from Europe experienced the lowest poverty rate. *Id.*; see also MICHAEL HOEFNER ET AL., U.S. DEPT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005 1 (2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf) (estimating that 10.5 million undocumented immigrants were living in the United States as of January 2005). It is also estimated that,

signal a movement away from traditional union-supported strikes and toward other methods of concerted employee activity.<sup>26</sup>

The national immigration reform rallies in April and May are certainly not the last of their kind. Another national day of demonstrations occurred on September 7, 2006,<sup>27</sup> and the immigration policy debate continues today.<sup>28</sup> Even if immigration reform is passed into law, other issues of national interest will undoubtedly arise, perhaps causing workers to rally once more. Because public protests are at the heart of American history and culture, and because the Supreme Court considers labor rights “fundamental,”<sup>29</sup> it is important to examine whether employees’ work stoppages to attend these public rallies are protected.

This Comment will explore American labor law as it applies to workers who attend public demonstrations for immigration reform in lieu of attending work. This Comment will first examine the basis of labor law, the NLRA, and the rights and obligations it enumerates. Then, this Comment will review the elements of protected employee activity under the NLRA. This Comment will next examine undocumented immigrant workers as employees under the NLRA. Then, this Comment will look at the requirement that protected employee activity be “concerted,” and will explore the meaning of the “mutual aid or protection” clause of the NLRA. This Comment will then review the final elements of protected activity, namely that such activity has a lawful objective achieved through lawful means. Next, this Comment will apply prior labor law decisions to the case at hand, analyzing whether the workers’ attendance at an immigration rally during work hours might be protected as “concerted activities for the purpose of . . . mutual aid or protection” within the meaning of section 7 of the NLRA. Finally, this Comment will argue that attendance at the immigration reform rallies is a protected activity under sec-

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during the four-year period between 2000 and 2004, 408,000 undocumented immigrants entered the U.S. each year. HOEFNER ET AL., *supra*, at 1. Of these undocumented immigrants, the study indicates that Mexico was the home country to 6 million in 2005. *Id.* Additionally, El Salvador, Guatemala, India, and China combined accounted for 1.4 million of the undocumented population in the U.S. in 2005. *Id.*

26. See Becker, *supra* note 23, at 352-55.

27. Karin Brulliard, *A True Believer in Immigrants*, WASH. POST, Sept. 20, 2006, at B1. The September 7, 2006 march for immigration reform, which occurred on the National Mall in Washington, D.C., drew fewer than 4,000 people. *Id.*

28. See Stephen Dinan, *Bush May Find an Ally on Immigration*, WASH. TIMES, Nov. 2, 2006, at A1 (“Immigration is the one major issue on which President Bush is likely to fare better next year if Democrats win control of Congress. The issue is unfinished business to which all sides promise to return, after House Republicans this year prevented Mr. Bush from winning both a guest-worker program and citizenship rights for most illegal aliens.”); *The Rusty Grenade*, ECONOMIST, Nov. 18-24, 2006, at 32, 34 (stating that the election of a Democratic majority removed the “biggest roadblock to [immigration] reform”).

29. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

tion 7 of the NLRA, and therefore, any employer discipline based upon employee attendance is an unfair labor practice in violation of section 8 of the Act.

## I. WORK STOPPAGES UNDER THE NATIONAL LABOR RELATIONS ACT: DEVELOPMENTS AND INTERPRETATIONS BY THE BOARD AND COURTS

### A. *The National Labor Relations Act: The Foundation of American Labor Law*

American labor policy was officially codified on July 5, 1935, with the passage of the Wagner Act, more commonly known as the National Labor Relations Act.<sup>30</sup> The first section of the NLRA announces:

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>31</sup>

The NLRA set forth specific employee rights in addition to establishing the NLRB for the administration of the Act and adjudication of violations.<sup>32</sup> In 1937, the Supreme Court upheld the constitutionality of the NLRA with its decision in *NLRB v. Jones & Laughlin Steel Corp.*<sup>33</sup> In *Jones & Laughlin*, the Court not only held that the Act was lawful, but also declared that the rights of employees under the Act were “fundamental.”<sup>34</sup>

The NLRA outlines numerous rights for employees and obligations for employers. Section 7 of the Act sets forth the protected employee rights of self-organization, collective bargaining, and “other concerted activities for the purpose of . . . mutual aid or protection.”<sup>35</sup> Employer obligations

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30. 29 U.S.C. §§ 151-169 (2000); see also THEODORE J. ST. ANTOINE ET AL., *LABOR RELATIONS LAW* 12 (11th ed. 2005).

31. 29 U.S.C. § 151.

32. See generally 29 U.S.C. §§ 151-169; see also ST. ANTOINE ET AL., *supra* note 30, at 12-13.

33. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 1.

34. *Id.* at 33.

35. 29 U.S.C. § 157 (2000); see also Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 923-24 (1992). The author states: “The Wagner Act, and section 7 in particular, was based not just on an economic theory but on a commitment to the rights of workers to join together and assert shared interests and concerns at the workplace.” Estlund, *supra*, at 944.



are enumerated in section 8 of the Act, which proscribes certain employer actions as unfair labor practices in violation of the Act.<sup>36</sup> For instance, section 8(a)(1) states “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7].”<sup>37</sup> In short, sections 7 and 8 are interconnected: if the employee activity is protected under section 7, any employer discipline in reaction to the employee’s protected activity will be characterized as an unfair labor practice as defined in section 8.<sup>38</sup>

*B. NLRA Protection Extends to Employee Activity that Embodies All  
Section 7 Requirements*

*1. The Status of Undocumented Immigrant Workers as “Employees”  
Under the NLRA*

To determine whether an employee’s work stoppage and attendance at immigration reform rallies is protected, the workers involved must qualify as protected “employee(s)” under the NLRA.<sup>39</sup> Although the exact immigration status of the workers who engaged in the work stoppages and attended the rallies is unclear, for the purposes of this Comment it will be assumed that most of the striking workers were either documented or undocumented immigrants. If those involved are, for example, documented lawful permanent residents, those workers have access to protection and remedies under the Act.<sup>40</sup> The only immigrant status that is problematic is the undocumented immigrant status.<sup>41</sup>

In *Sure-Tan, Inc. v. NLRB*, the Supreme Court found that it was an unfair labor practice for an employer to report undocumented employees to

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36. See 29 U.S.C. § 158 (2000).

37. See *id.* § 158(8)(1).

38. See *id.* §§ 157-158; see also Alexandra E. Burns, Comment, *Eroding “Mutual Aid or Protection”: Subjective Motivation and Employee Refusals to Cross Picket Lines*, 48 EMORY L.J. 267, 270 (1999) (“If the employee’s activity is protected, the employer’s interference with that activity is an unfair labor practice. While rights of employees are created under section 7, employers who violate section 7 rights also violate section 8 of the NLRA.”).

39. See 29 U.S.C. §§ 152(3), 157; see also Kay H. Hodge, *Unfair Labor Practices Under the National Labor Relations Act*, 70 A.L.I. – A.B.A. 515, 518 (2006), available at SL070 ALI-ABA 515 (Westlaw) (explaining that the labor rights announced by the NLRA are only available to those people determined to be “employees” under the language of the Act).

40. See generally *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); see also Lilah S. Rosenblum, *Mistakes in the Making: The Failure of U.S. Immigration Reform to Protect the Labor Rights of Undocumented Workers*, 13 HUM. RTS. BRIEF, Spring 2006, at 23, 25 (contending that the *Hoffman* decision created “two classes of workers: documented workers who are entitled to the full protection of U.S. labor laws and undocumented workers who are no longer fully protected”).

41. See Rosenblum *supra* note 40, at 23, 25.

the Immigration and Naturalization Services ("INS") after the employees became involved with a union.<sup>42</sup> The Court held that the NLRA's protections apply to "any employee," with only a few specific exceptions enumerated by Congress.<sup>43</sup> Because undocumented aliens are not mentioned in these exceptions to employee status, the Court interpreted the Act to cover undocumented workers as employees.<sup>44</sup> The Court further expounded on the connection between the labor rights of the undocumented worker and those of native-born American employees:

If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.<sup>45</sup>

By assuring "standard terms of employment" for all workers through the application of the NLRA,<sup>46</sup> the Court suggested employers will have less incentive to hire undocumented workers over lawful U.S. residents.<sup>47</sup>

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42. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-94 (1984).

43. See *id.* at 891. The exceptions to which the Court refers are found in 29 U.S.C. § 152(3):

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 5], as amended from time to time, or any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (2000).

44. See *Sure-Tan, Inc.*, 467 U.S. at 892-93.

45. *Id.* at 892 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)).

46. *Id.* at 893 ("Application of the NLRA [to undocumented immigrant workers] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.").

47. See *id.*; see also *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) ("Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions."); Rosenblum, *supra* note 40, at 25 ("The availability of workers who will expect and demand less from their employers allows employers in turn to lower workplace labor standards for all employees. The resultant depression of wages, deterioration of work conditions, and obstacles to labor organizing harm both U.S. and foreign workers.").

The Supreme Court revisited this issue and altered the protected status of undocumented workers when it considered *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>48</sup> In this case, an employer laid off several employees who were active in the union organizing drive at a plastics plant.<sup>49</sup> One of the discharged employees was Jose Castro, a Mexican national who had provided false immigration documentation in order to obtain employment.<sup>50</sup> Although the Court affirmed the NLRB's decision that the employer had committed an unfair labor practice against the union organizers, including Mr. Castro, it concluded that, as an undocumented worker, Mr. Castro could not receive backpay.<sup>51</sup> The Court reasoned that awarding this remedy would conflict with the Immigration Control and Reform Act, which prohibits the employment of undocumented immigrants.<sup>52</sup> Although this decision reaffirmed that the NLRA protects undocumented workers as employees, *Hoffman* effectively removed any

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48. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

49. *Id.* at 140.

50. *Id.* at 140-41.

51. *Id.* at 151-52. To reach this conclusion, the Court focused on the Congressional intent behind both immigration and labor laws:

What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. . . . Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.

*Id.* at 149-50.

52. *Id.* at 148-50; see also 8 U.S.C. § 1324(a)(1) (2000) ("In general, it is unlawful for a person or an entity—(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or (B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section . . . ."); see also Memorandum from Richard A. Siegel, Acting Associate General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers (Feb. 14, 1997), available at [http://www.nlr.gov/shared\\_files/OM%20Memos/1997/OM%2097-11.pdf](http://www.nlr.gov/shared_files/OM%20Memos/1997/OM%2097-11.pdf) (instructing NLRB officers on how the NLRB should interact with the Immigration and Naturalization Service following the enactment of the ICRA). The memorandum states:

Under these instructions, INS agents may be contacting Information Officers at National Labor Relations Board Regional Offices to make inquiries regarding the status of unfair labor practice and representation cases pending in the Region. Consistent with long-standing practice, the NLRB will promptly offer full cooperation to another Federal agency making any inquiry in the course of its law enforcement activities.

With knowledge of a labor dispute involving an employer of employees whose status under the immigration laws has been questioned, Immigration authorities will consider in what fashion that fact should impact their enforcement activities. Also, under the instructions, arrangements for the interview by Board agents of aliens held by the INS will be considered on a case-by-case basis.

*Id.*

remedies available to undocumented workers if the employer discharged or disciplined them in violation of the Act.<sup>53</sup>

## 2. Protected Section 7 Activity Must Be “Concerted”

Provided that the individuals involved are employees under the NLRA, employee activity will only receive protection under section 7 of the Act if the activity falls within the protected activities specified there, or if it is “concerted.”<sup>54</sup> Concerted employee activity ranges from large groups of employees acting together, to one employee acting alone in the interest of other employees.<sup>55</sup>

In *NLRB v. Washington Aluminum Co.*, the Supreme Court concluded that seven non-union employees who walked off the job engaged in concerted activities protected by the NLRA.<sup>56</sup> The employees at an aluminum fabrication plant were forced to work in very cold conditions.<sup>57</sup> After their complaints received no response from the management, the employees decided to walk off the job together.<sup>58</sup> Their employer discharged them soon thereafter.<sup>59</sup> In its opinion, the Supreme Court stated:

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53. See *Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting) (“Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity. . . . Hence, the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.” (citations omitted)); see also *Rosenblum*, *supra* note 40, at 25 (“[M]any employers feel emboldened to violate the rights of undocumented workers because there is little economic deterrent to discourage them from doing so.”). But see *Hoffman*, 535 U.S. at 152 (stating that “[l]ack of authority to award backpay does not mean that the employer gets off scot free”). The Court asserted that when employers commit unfair labor practices against undocumented workers, they are still punished through other means. *Id.* (“The Board here has already imposed other significant sanctions against [the employer]. . . . includ[ing] orders that [it] cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. . . . [S]uch ‘traditional remedies’ [are] sufficient to effectuate national labor policy regardless of whether the ‘spur and catalyst’ of backpay accompanies them.”). *Id.*

54. 29 U.S.C. § 157 (2000).

55. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962) (finding group activity to be protected under section 7); *NLRB v. Pace Motor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983) (per curiam) (finding individual activity to be protected under section 7).

56. See *Wash. Aluminum Co.*, 370 U.S. at 12, 18.

57. *Id.* at 10-11. The employees worked in a shop that was not insulated and had doors that were often open to the outside. *Id.* at 10. The work stoppage occurred on a very cold day in January, when the furnace was broken and the temperature hit a low of eleven degrees and a high of twenty-two degrees. *Id.* at 11.

58. *Id.* at 11-12 (One worker stated: “And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant this way”).

59. *Id.* at 12.

The bitter cold of January 5 . . . brought these workers' individual complaints into concert so that some more effective action could be considered. . . . [The men] walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment.<sup>60</sup>

In this decision, the Court emphasized the value of group action in non-union workplaces as an effective means of getting the employer's attention.<sup>61</sup>

Employee activity may also be considered "concerted" when one employee acts alone in the interest of others.<sup>62</sup> In *NLRB v. Pace Motor Lines, Inc.*, the United States Court of Appeals for the Second Circuit protected a non-union employee's refusal to drive an unsafe vehicle as concerted activity because the activity was part of a "continuing group effort."<sup>63</sup> The court reasoned that "[i]ndividual activity can be protected . . . if it is 'looking toward group action.'"<sup>64</sup> The court viewed the employee's refusal to drive an unsafe truck as one incident in an ongoing collective employee action to obtain safer equipment for the workplace.<sup>65</sup>

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60. *Id.* at 15.

61. *Id.*; see also *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 641-42 (5th Cir. 1986) ("Certainly the work stoppage was a concerted action, having been undertaken by several employees who acted together after discussing among themselves their common grievance.").

62. See *Burns*, *supra* note 38, at 274-75 (discussing the four scenarios where an individual employee's action might be considered concerted); Brian D. Shonk, Casenote, *Individual Employee Rights Versus the Rights of Employees as a Group*: *NLRB v. City Disposal Systems*, 27 B.C. L. REV. 453, 454-57 (1986) (examining the Board and court treatment of individual activity that is considered concerted in both union and non-union settings); Hodge, *supra* note 39, at 520 (discussing individual activity, which may be concerted if it is on behalf of others or is the "logical outgrowth" of group activity).

63. *NLRB v. Pace Motor Lines Inc.*, 703 F.2d 28 (2d Cir. 1983) (*per curiam*); see also, e.g., *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (holding that four employees who refused to work overtime were engaged in concerted activity when there were previous group complaints about the schedule); *Every Woman's Place, Inc.*, 282 N.L.R.B. 413, 413 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987) (holding that an individual employee's phone call to the U.S. Department of Labor regarding pay requirements was protected as concerted activity when several employees had discussed the issue of paid holidays with the employer in the past).

64. *Pace Motor Lines*, 703 F.2d at 29 (quoting *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980)) (alteration in original).

65. *Id.* at 29-30. In finding group effort, the court examined the employee's actions along with previous examples of employee communication with the employer:

[I]t appears that Zamfino's action was part of a continuing group effort to ameliorate allegedly unsafe working conditions. A number of drivers had problems with unsafe vehicles. At a December 1980 employee meeting, the drivers told the Company of their safety concerns. Immediately after his refusal to drive, Zamfino contacted the union in order to have active union organizing efforts resumed. Zamfino then encouraged employees to sign union cards, in part with the argument that it was time to

There are some limits to protected individual activity, as evidenced by the Board's decision in *Meyers Industries, Inc.* (commonly known as the *Prill* case).<sup>66</sup> In that case, a non-union truck driver refused to drive his truck and called a state agency to report unsafe brakes.<sup>67</sup> In its decision, the Board confirmed that it would interpret "concerted activity" to include situations "where individual employees seek to initiate or to induce or to prepare for group action . . . ."<sup>68</sup> Yet, the Board refused to view this truck driver's actions as concerted, reasoning that there was no evidence that this employee "joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor."<sup>69</sup>

*3. Protected Section 7 Activity Must Also Be "For the Purpose of . . . Mutual Aid or Protection"*

After employee activity is found to be concerted, the next step in examining whether it is protected by section 7 of the NLRA is to determine whether the activity is "for the purpose of . . . mutual aid or protection."<sup>70</sup> The statutory language of section 7 of the NLRA is unambiguous in its protection of the rights of organized employees involved in certain union activity, explicitly enumerating "the right to self-organization, to form, join, or assist labor organizations . . . ."<sup>71</sup> The Act extends to other types of employee action, however, and guarantees the right of organized or unorganized employees to engage in more broadly defined activities that demonstrate the required purpose.<sup>72</sup>

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"institute safety methods." A number of drivers signed the cards . . . . Under these circumstances, we believe the Board had sufficient evidence to support its conclusion that Zamfino's refusal to drive was part of concerted employee efforts to obtain safe equipment.

*Id.*

66. *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 882 & n.4 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (1987).

67. *Id.* at 882.

68. *Id.* at 887.

69. *Id.* at 885-86. Under the facts of this case, the Board found that the truck driver was never involved in any of the requisite prior group action, so his behavior did not qualify as concerted. *Id.* at 888-89.

70. *See id.*; 29 U.S.C. § 157 (2006).

71. 29 U.S.C. § 157.

72. *Id.*; *see also* Estlund, *supra* note 35, at 922-23 ("Section 7 of the NLRA, enacted in 1935, gives to most private sector employees the right to engage in 'concerted activities for the purpose of . . . mutual aid or protection.' Central among the activities covered by section 7 are union organizing and strikes to improve working conditions, but section 7 also protects employee protest and advocacy unrelated to traditional union activity." (alteration in original) (footnote omitted)).

In *Eastex, Inc. v. NLRB*, the Supreme Court considered the meaning of the “mutual aid or protection” clause.<sup>73</sup> The Court found that an unfair labor practice occurred when an employer prohibited the distribution of a union newsletter to production employees in a paper mill.<sup>74</sup> This newsletter not only reported union news, but also instructed workers on how to write to legislators regarding a pending “right-to-work” state statute and urged employees to vote in national elections in response to the President’s veto of a minimum wage law.<sup>75</sup>

The *Eastex* Court first determined that the “mutual aid or protection” clause protected this type of employee activity, even if the newsletter was intended to benefit not only Eastex employees, but any employees, regardless of employer.<sup>76</sup> Next, the Court held that the political content of the newsletter was protected because the proposed state legislation and the level of the minimum wage bore “such a relation to employees’ interests as to come within the guarantee of the ‘mutual aid or protection’ clause.”<sup>77</sup>

The *Eastex* Court went on to determine that the purposes of the employee activity did not have to be related to a specific dispute with their employer, but may also be protected if the employees “seek to . . . otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”<sup>78</sup> The Court further explained “that the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that em-

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73. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978).

74. *Id.* at 558-59, 570.

75. *Id.* at 559. In the opinion, the Court outlined the specific contents of the newsletter:

The newsletter was divided into four sections. The first and fourth sections urged employees to support and participate in the union and, more generally, extolled the benefits of union solidarity. The second section encouraged employees to write their legislators to oppose incorporation of the state “right-to-work” statute into a revised state constitution then under consideration, warning that incorporation would “weake[n] Unions and improv[e] the edge business has at the bargaining table.” The third section noted that the President recently had vetoed a bill to increase the federal minimum wage from \$1.60 to \$2.00 per hour, compared this action to the increase of prices and profits in the oil industry under administration policies and admonished: “As working men and women we must defeat our enemies and elect our friends. If you haven’t registered to vote, please do so today.”

*Id.* at 559-60 (alteration in original).

76. *Id.* at 564-65.

77. *Id.* at 569.

78. *Id.* at 565.

ployees' appeals to legislators to protect their interests as employees are within the scope of this clause."<sup>79</sup>

The *Eastex* Court also pointed out that there is a limit to what "mutual aid or protection" will cover: "[A]t some point the relationship [between the concerted activity and the employees' interest as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."<sup>80</sup> The Court left it to the Board to determine the outer boundaries of the clause's coverage.<sup>81</sup>

In *Kaiser Engineers*, the NLRB read the "mutual aid or protection" clause broadly, with an approach similar to that of the *Eastex* Court.<sup>82</sup> In that case, the employees were engineers who formed a labor organization called the Civil Engineering Society ("the Society").<sup>83</sup> After learning about possible upcoming changes in Department of Labor regulations that would allow increased immigration of foreign engineers, the leader of the Society drafted a letter expressing opposition to these changes and sent it to several national legislators.<sup>84</sup> Upon learning of the letter, the

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79. *Id.* at 566 (footnote omitted); see also Joseph P. Mingolla, Recent Case, *Rights of Employee Members of Outside Political Groups to Distribute Literature on the Employer's Property*: NLRB v. Motorola, 35 B.C. L. REV. 401, 403 (1993) (discussing each element of the *Eastex* decision in comparison to the court's decision in *NLRB v. Motorola*). But see Estlund, *supra* note 35, at 927-28 (criticizing the *Eastex* decision as too narrow of an interpretation of the mutual aid or protection clause.) The author states:

*Eastex* demonstrates that some speech on matters beyond the actual terms and conditions of employment—even matters over which the employer has no direct control—may gain section 7 protection, but only if it can be linked to a traditional self-interested economic objective. In the absence of such an objective, section 7 does not protect even employee protests aimed at the practices of their own employer.

*Id.* at 928.

80. *Eastex*, 437 U.S. at 567-68; see also Local 174, UAW v. NLRB, 645 F.2d 1151, 1155 (D.C. Cir. 1981) (demonstrating when an employee activity will fail this attenuation test and will not fall under mutual aid and protection clause).

81. *Eastex*, 437 U.S. at 568.

82. See *Kaiser Eng'rs*, 213 N.L.R.B. 752, 755 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976).

83. *Id.* at 752-53. In its opinion, the Board determined that the Society was a "labor organization" under section 2(5) of the NLRA. *Id.* at 756; see also 29 U.S.C. § 152(5) ("The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.").

84. *Kaiser Eng'rs*, 213 N.L.R.B. at 754.

The entirety of the Society's letter to the legislators was, as follows:

Dear Sir,

We write on behalf of a group of about 70 civil engineers at Kaiser Engineers.

It has come to our attention that Bechtel Corp. is seeking authorization [sic] from the Dept of Labor [sic] to obtain resident visas for any engineers they may recruit outside the country. We realise [sic] that at the minute engineers are in demand. However, to import engineers at this time of boom will be extremely shortsighted for as the market is bound to ease, engineers will be made redundant, and we could have



employer discharged the leader of the Society.<sup>85</sup>

The Board concluded that the Society's letter was protected as an "action to persuade legislators to prevent the increased influx of alien engineers . . . for the mutual aid or protection of the members of the Society as well as their fellow engineers in the profession."<sup>86</sup> As the Supreme Court did in its *Eastex* decision, the Board interpreted the meaning of "mutual aid or protection" to include employee communication with national lawmakers in order to express the employees' opinions on legislation, for the benefit of themselves as groups of employees and others in their profession.<sup>87</sup>

The outer boundaries of the "mutual aid or protection" clause's coverage were tested by the United States Court of Appeals for the D.C. Circuit in *Tradesmen International Inc. v. NLRB*.<sup>88</sup> In that case, a union organizer testified before a local regulatory board in an attempt to force the employer to pay a surety bond for any work the employer performed for the city.<sup>89</sup> The employer subsequently refused to hire the organizer because of his public testimony.<sup>90</sup> While the court assumed, without deciding, that the testimony constituted concerted activity, it determined that the connection between his testimony on surety bonds and the "'employees' interests as employees" was 'so attenuated that [it] [could not] fairly be deemed to come within the "mutual aid or protection" clause' of Section 7."<sup>91</sup>

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conditions that existed immediately after the big cut-back in the aerospace industry recently.

Engineers as a profession are not well organized [sic] at present and so cannot influence such matters as, say, the unions of the AMA can. So it is to our legislators that we must look for some protection from the indiscriminate importation of engineers by large companies.

We hope that you can exert some influence on our behalf.

*Id.* (first, third, and fourth alterations in original).

85. *Id.*

86. *Id.* at 755.

87. *See id.*

88. 275 F.3d 1137, 1139, 1141 (D.C. Cir. 2002).

89. *Id.* at 1139.

90. *Id.* at 1139-40.

91. *Id.* at 1142 (quoting *Eastex Inc v. NLRB*, 437 U.S. 556, 568 (1978)) (first alteration in original). The court further explained, "an employee's activity will fall outside of section 7's protective reach if it fails in some manner to relate to 'legitimate employee concerns about employment-related matters.' Thus an essential element before section 7's protections attach is a nexus between one's allegedly protected activity and 'employees' interests as employees.'" *Id.* at 1141 (citations omitted); *see also* Bill Hylen, Casenote, *NLRB v. Motorola: A Narrow Interpretation of the "Mutual Aid or Protection" Clause of the National Labor Relations Act*, 26 ARIZ. ST. L.J. 253, 259 (1994) (discussing the attenuation test as applied in *NLRB v. Motorola*, where the court found the employee interest in distributing literature against random drug testing at the workplace was not sufficiently

#### 4. Activity Protected Under Section 7 Must Be for a Lawful Objective and Performed Through Lawful Means

Even if the employee activity is found to be “concerted” and intended for purposes of “mutual aid or protection,” it still might not gain protection under the NLRA if the activity is “so indefensible as to warrant the employer in discharging participating employees.”<sup>92</sup> An employee action may become indefensible and unprotected because of “[e]ither an unlawful objective or the adoption of improper means.”<sup>93</sup>

Most often, the factor that determines NLRA protection is the lawfulness of the *means* used by the employees.<sup>94</sup> Some classic examples of protected means of employee activity include traditional total strikes and picket lines,<sup>95</sup> while methods involving violence or the destruction of property have routinely been found unlawful.<sup>96</sup> As the case law indicates,

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related to their interests as employees and was not covered by the mutual aid or protection clause).

92. *In re Elk Lumber Co.*, 91 N.L.R.B. 333, 337 (1950).

93. *Id.* In previously discussed cases, one can find examples of lawful, protected objectives of employee activity, such as: organizing a union, *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002), improving working conditions, *NLRB v. Wash. Aluminum Co.*, 379 U.S. 9, 14, 17 (1962), increasing workplace safety, *NLRB v. Pace Motor Lines Inc.*, 703 F.2d 28, 29-30 (2d Cir. 1983), and changing local or national legislation, *Kaiser Eng'rs*, 213 N.L.R.B. 752, 755 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976); see also *supra* text accompanying notes 48-51, 56-58, 63-65, 82-85.

94. See Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1689 (1989) (“It is usually not difficult to determine when an activity is ‘concerted,’ . . . nor is it very difficult to determine whether the activity is for ‘mutual’ aid or protection. It is often a puzzling task, however, to determine whether the nature of the activity is protected and whether the type of object for which the employees engage in the activity deprives them of the Act’s protection.”).

95. See THE DEVELOPING LABOR LAW 196-97 & n.579 (John E. Higgins, Jr. et al. eds., 5th ed. 2002); Hodge, *supra* note 39, at 521 (“Examples of protected concerted activity include: work stoppages[,] refusal to work voluntary on-call[,] honoring picket lines[,] filing or processing grievances in court[,] protests of racial or other discrimination[, and] employer’s advocating for use of sick time during FMLA leaves.”).

96. See *Johns-Manville Prods. Corp. v. NLRB*, 557 F.2d 1126, 1133 (5th Cir. 1977) (holding that industrial peace and public policy dictate that employee activity that results in damage to property or potential danger to human life is not protected); *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1004 (8th Cir. 1965) (listing unprotected activities such as “[s]itdown strikes marked with violence” and “strikes in which the employees distributed handbills defaming the quality of their employer’s product”). See also Hodge, *supra* note 39, at 521-22 (“Examples of concerted activity that is not protected: disparaging employer’s product[,] disloyalty[,] . . . disruption of work[,] sit-down strikes[,] partial or intermittent strikes[, and] advocating for an employee stock ownership plan” (citations omitted)); Morris, *supra* note 94, at 1707-08. Professor Morris suggests that two limitations may render concerted activity unprotected:

(1) If the conduct violates law or policy or (2) if there is some legitimate business justification for the employer’s limiting or preventing the conduct, such as the need to maintain production or discipline. As to the first kind of limitation, . . . concerted

the inquiry into whether the activity is lawful and protected becomes more complicated when the employee activity is non-traditional.<sup>97</sup>

*a. Some Concerted Employee Activities Fall Outside of Section 7 Protection Because They Are Indefensible Means of Obtaining a Lawful Objective*

The United States Court of Appeals for the Eighth Circuit examined the question of unprotected concerted activity in *NLRB v. Montgomery Ward & Co.*<sup>98</sup> The employees at one plant would not perform their assigned duties to process orders from another plant that was on strike.<sup>99</sup> The court found that the employees had full rights to go on strike themselves, but their refusal to complete their duties while still receiving pay from the employer constituted unprotected activity under the NLRA.<sup>100</sup>

In *In re Elk Lumber Co.*, the Board found that a work slowdown amounted to indefensible employee conduct and was unprotected by the Act.<sup>101</sup> In this case, the employees loaded lumber onto railroad cars for the wage of \$2.71 an hour and were able to load about "two to three cars a day."<sup>102</sup> After the method of loading the cars was altered so that the task was "easier and more steady," the employer lowered the pay rate to \$1.52½ an hour.<sup>103</sup> In response, the employees decided to reduce their

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conduct of a violent, disloyal, or disruptive nature, or concerted conduct that violates other laws, such as the law of trespass, may be unprotected.

Morris, *supra* note 94, at 1707-08 (footnotes omitted).

97. See THE DEVELOPING LABOR LAW, *supra* note 95, at 196-214; discussion *infra* Parts I.B.4.a-b.

98. 157 F.2d 486, 489-90 (8th Cir. 1946).

99. *Id.* at 496.

100. *Id.* The court reasoned:

It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. . . . While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.

*Id.* (citations omitted); cf. Yale Univ., 330 N.L.R.B. 246, 246-47 (1999) (finding that graduate students who were serving as teaching assistants engaged in an unprotected partial strike when they refused to submit final grades from the previous semester, while still teaching classes and receiving pay, in order to pressure the university into bargaining with them).

101. *In re Elk Lumber Co.*, 91 N.L.R.B. 333, 337-39 (1950).

102. *Id.* at 335.

103. *Id.*

rate of work to load only one car per day.<sup>104</sup> The Board reasoned that the employees' slowdown was unprotected because it "constituted a refusal on their part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue rather to work on their own terms."<sup>105</sup>

The Board again deliberated on unprotected concerted activity in *Pacific Telephone & Telegraph Co.*<sup>106</sup> Here, a union and employer came to an impasse in talks over a new contract.<sup>107</sup> Attempting to pressure the employer into concessions, the union encouraged employees to walk off the job, then briefly return to work before walking off the job again.<sup>108</sup> The union claimed that it intended to "harass the company into a state of confusion"<sup>109</sup> and pressure it into a new contract.<sup>110</sup> The Board found that the union had tried to create a state of "neither strike nor work," and stated that "[h]owever lawful might have been the economic objective . . . the inherent character of the method used sets this strike apart" and renders it unprotected.<sup>111</sup>

In *NLRB v. Blades Manufacturing Corp.*, the United States Court of Appeals for the Eighth Circuit reversed a Board decision and held that three separate, day-long employee walkouts were not protected under the NLRA.<sup>112</sup> While unfair labor practice charges were pending with the

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104. See *id.* The Board noted that:

Some of the carloaders thereupon decided among themselves that it was sufficient to load one car a day, and proceeded to work at approximately that rate until February 7. The rate was adopted, according to their testimony, because it was the quota at other plants in the same area, and because they "thought one carload was a good day's work at a dollar and a half." Admittedly, they could have loaded more cars in a day, would have done so for more pay, and knew that the Respondent was not satisfied with their production.

*Id.*

105. *Id.* at 337.

106. 107 N.L.R.B. 1547 (1954).

107. *Id.* at 1547.

108. *Id.* at 1548. The Board noted:

[The union] chose . . . to resort to a form of economic warfare entirely beyond the pale of proper strike activities. . . . The scheme was designed to compel the Respondent to "get its defenses up"—or gather substitute workers wherever a stoppage was unexpectedly pulled—"only to have the picket line gone" when the emergency crews reached the picketed place.

*Id.* at 1547-48.

109. *Id.* at 1548.

110. See *id.* at 1547-48.

111. *Id.* at 1549-50.

112. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1001-02, 1005-06 (8th Cir. 1965). In this case, the employees rejected the union by a majority in a representation election, but the union attempted to get the election set aside based on charges that the employer committed unfair labor practices prior to the election. *Id.* at 1000. Based on these charges, the Board granted a new election, which the union then won. *Id.* After the union was certified, the employer still refused to bargain and the union filed more unfair labor practice

NLRB, the union organized the repeated walkouts in response to the employer's ongoing refusal to bargain and address their grievances.<sup>113</sup> The court found that "deliberate 'slowdowns' and 'walkouts' by the employees to exert pressure on the employer to accept the union's bargaining demands were unprotected concerted activities."<sup>114</sup> Furthermore, the court noted that the repetitious nature of the walkouts and the union's threat to continue the activity in the future were factors weighing against protection.<sup>115</sup>

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charges with the NLRB. *Id.* The court ultimately found that the employer's single threatening comment to one employee prior to the first union representation election was not severe enough to be considered an unfair labor practice. *Id.* at 1003-04. Therefore, the court found that the employer did not actually have a duty to bargain with the union or listen to union grievances. *Id.* at 1004. The court addressed the protected nature of the employee walkouts as "a quite separate question," apart from the representation and unfair labor practice analysis. *Id.*

113. *Id.* at 1001-02. The union continued to request that the employer recognize the union steward as the employees' representative in handling employee grievances such as reprimands for insufficient production or disciplinary layoffs. *Id.* at 1001. However, the employer continued to insist on dealing with individual employees directly. *Id.*

114. *Id.* at 1005.

115. *Id.* The court stated that "the repetitiousness of the intermittent walkouts within a short span of time was sufficient in the light of the Union's threat to continue the activity in the future so as not to distinguish the situation here from the *Briggs-Stratton* case." *Id.* The *Briggs-Stratton* case is one of only a few times the Supreme Court has discussed the issue of unprotected concerted activity. See *Int'l Union, UAW, Local 232 v. Wis. Employment Relations Bd. (Briggs-Stratton)*, 336 U.S. 245, 249, 252-53, 264-65 (1949); Becker, *supra* note 23, at 376-83. In *Briggs-Stratton*, the Supreme Court indirectly examined employee conduct outside the scope of section 7 protection while deliberating on labor preemption. *Briggs-Stratton*, 336 U.S. at 252-53. The union called twenty-six unplanned mid-day meetings over the course of four months, each time causing the employees to leave their work stations and stop production. *Id.* at 249. The union publicly heralded these work stoppages as an effective way to pressure the employer into a collective bargaining agreement without forcing the employees into the risky position of strikers. *Id.* at 249-50. In its decision, the Court did not directly rule on the legality of these work stoppages, but determined that federal labor law did not preempt Wisconsin state law because the Act did not specifically address these types of "recurrent or intermittent unannounced stoppage[s] of work." *Id.* at 264-65.

Almost thirty years later, in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, the Supreme Court overruled *Briggs-Stratton* on the preemption issue and again indirectly addressed the protection of partial or intermittent strikes. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 151-53 (1976). The Court suggested in a footnote that partial strikes are not per se unlawful and indicated that the NLRB should adjudicate these partial strike cases on a "case-by-case" basis. *Id.* at 152 n.14. Although these preemption opinions only examine the protection of partial and intermittent strikes in dicta, several scholars have used these Supreme Court cases to argue that the Court is signaling its approval for an alternative interpretation of the NLRA's coverage of partial and intermittent concerted activity. See Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 226-27 (2000) ("The combined effect of these decisions left partial and intermittent strikes in a 'no-man's land,' free from state and federal unfair labor practice laws, but also unprotected

Most recently, the United States Court of Appeals for the Sixth Circuit examined partial strike activity in *Vencare Ancillary Services, Inc. v. NLRB*.<sup>116</sup> In this case, a group of five rehabilitation therapists protested wage changes by refusing to see patients, while continuing to perform other clerical tasks until their grievances were heard.<sup>117</sup> The court concluded that this activity did not fall within the protection of section 7, stating:

“Employees may protest and seek to change any term or condition of their employment, and their ultimate sanction is the strike . . . . What may make such a work stoppage unprotected is exactly what makes any work stoppage unprotected, that is, the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced . . . . They may not simultaneously walk off their jobs but retain the benefits of working.”<sup>118</sup>

The court found that because the rehabilitation therapists did not “completely stop working,” and did not perform the work that made them eligible for pay, they failed to engage in a protected strike.<sup>119</sup> As the Board concisely stated in *Pacific Telephone*, and as courts have reiter-

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under federal law. Thus, while strikers could not be subject to ULP proceedings for these strikes, they could be fired lawfully.”); Becker, *supra* note 23, at 380-83 (discussing the Supreme Court’s indirect treatment of partial and intermittent strikes and what this means in terms of NLRA protection); Julius G. Getman, *The Protected Status of Partial Strikes After Lodge 76: A Comment*, 29 STAN. L. REV. 205, 205-06 (1977) (“*Lodge 76* overruled *Briggs & Stratton* on the issue of federal preemption, but the opinion did not explicitly overturn *Briggs & Stratton*’s conclusion that partial strikes are unprotected. Nevertheless the force of the Court’s reasoning in *Lodge 76* together with the logic of its earlier decisions compel the conclusion that the NLRB should hold partial strike activity protected.”). But see Kenneth T. Lopatka, *The Unprotected Status of Partial Strikes After Lodge 76: A Reply to Professor Getman*, 29 STAN. L. REV. 1181, 1181-82 (1977) (arguing against Professor Getman’s conclusion that partial strikes should be protected following the *Lodge 76* decision).

116. 352 F.3d 318, 319, 322 (6th Cir. 2003).

117. *Id.* at 320. After being notified that their wages were being reduced, a group of employees drafted a letter including their demands regarding wages, amount of workload, and job scheduling. *Id.* A representative of the employee group told a manager that “the employees were going to refuse to see patients that day until someone from upper management met with them to discuss their issues.” *Id.* Instead of meeting with patients, the rehabilitation employees remained at the workplace and performed administrative tasks. *Id.* The following day the employees refused to meet with management individually, insisting on being present as a group, and all of them were later discharged for insubordination. *Id.* at 321.

118. *Id.* at 324 (quoting First Nat’l Bank of Omaha, 171 N.L.R.B. 1145, 1151 (1968)) (first alteration in original).

119. *Id.* at 323-25.

ated, when employees put themselves into a status that is "neither strike nor work," the employee activity cannot receive protection.<sup>120</sup>

*b. Some Non-Traditional Concerted Activity is Protected by the NLRA*

Although the case history indicates that activity other than a traditional total strike is problematic in terms of its protected status, the courts and the Board have carved out a few narrow exceptions to this rule over the years.<sup>121</sup> In *NLRB v. A. Lasaponara & Sons, Inc.*, the United States Court of Appeals for the Second Circuit considered the lawfulness of a one-day work stoppage.<sup>122</sup> The employer, who had exhibited union hostilities in the past, refused to discuss an adjustment to the work schedule after many employees signed a petition against working on Palm Sunday.<sup>123</sup> The union representative attempted to speak with the employer about alternatives to working on that day, such as making up missed hours the following week, but the employer refused.<sup>124</sup>

After employees intentionally missed work on Palm Sunday, the employer fired them.<sup>125</sup> The court found that this "one day strike or work stoppage" was a protected means of changing working conditions because "the economic pressure brought to bear here . . . failed to reach a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected."<sup>126</sup> Here, the court weighed the cost to the employer of one day of lost production against the employees' "legitimate work-related goal," and decided that the employees' objective of not working on a religious holiday was at least as important as the employer's production interest.<sup>127</sup>

More recently, the United States Court of Appeals for the Fifth Circuit distinguished unprotected partial strikes from protected one-time strikes in *NLRB v. McEver Engineering, Inc.*<sup>128</sup> That case involved non-union construction workers who were ordered to work outdoors in heavy rainfall.<sup>129</sup> Employees informed their supervisor of the slippery, muddy, and generally unsafe working conditions created by the rain, but received no

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120. Pac. Tel. & Tel. Co., 107 N.L.R.B. 1547, 1549 (1954); *see also* discussion *supra* Part I.B.4.a.

121. *See* discussion *infra* Part I.B.4.b.

122. *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976).

123. *Id.* at 996-98.

124. *Id.* at 997-98.

125. *Id.* at 998.

126. *Id.*; *see also* *NLRB v. Leprino Cheese Co.*, 424 F.2d 184, 186 (10th Cir. 1970) (holding that a one-day employee strike to protest working conditions, with intent to return to work the next day, was protected activity).

127. *See A. Lasaponara & Sons, Inc.*, 541 F.2d at 998.

128. 784 F.2d 634, 638-39 (5th Cir. 1986).

129. *Id.* at 636-37.

response.<sup>130</sup> At lunch, several of the workers decided the conditions were too poor to continue work and did not return to the work site.<sup>131</sup> When the employees did not return after lunch, the supervisor filled out termination papers.<sup>132</sup>

The *McEver* court concluded that the employees' work stoppage was protected section 7 activity because they "did not refuse to perform certain tasks while accepting others," but instead "completely stopped working—in effect walked off the job."<sup>133</sup> In addition, the court noted that the employees need not make any specific demand of the employer, instead indicating that when non-union employees are involved in such a situation, "the employer 'should reasonably see that the improvement of working conditions is behind the employees' action.'"<sup>134</sup>

## II. THE PROTECTIVE REACH OF THE NLRA: EXAMINING WORK STOPPAGES AND PUBLIC RALLIES

### A. "Concerted" Employee Activity: A Work Stoppage in Order to Attend an Immigration Rally Must Be Group Action or Action in the Interest of Others

As the case law indicates, the first question to address when considering the availability of section 7 protection for workers who attend immigration rallies is whether the employee activity involved was "concerted."<sup>135</sup> When evaluating the plausible facts underlying the unfair labor practice charges in the instant case, two possible scenarios that may affect the concerted nature of these activities are presented: either one employee skipped work and attended the rally on his own, or two or more employees missed work and attended the rally together.<sup>136</sup>

In the case of two or more employees boycotting work in order to attend the rally together, the concertedness of the scenario is patent.<sup>137</sup> As in *Washington Aluminum Co.*, any time two or more employees act to-

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130. *Id.*

131. *Id.* at 637.

132. *Id.* at 638.

133. *Id.* at 639.

134. *Id.* at 640.

135. See *supra* Part I.B.2; see also *Morris*, *supra* note 94, at 1702 ("The first question asks whether the employee or employees are engaged in activity that is either concerted or so related to concertedness that the right to engage in concerted conduct is reasonably affected" (emphasis omitted)). See generally *Shonk*, *supra* note 62 (discussing section 7 protection in terms of the varying interpretation of the concerted requirement).

136. See *Turnbull*, *supra* note 8 (discussing plans of individual workers and groups of workers to take time off of work in order to attend immigration reform rallies in the Seattle area).

137. See *Morris*, *supra* note 94, at 1703 ("When employees deliberately act together, or agree to act together, their conduct is clearly concerted.").



gether for the purpose of mutual aid or protection, such action is considered concerted for the purposes of the Act.<sup>138</sup> Therefore, if two or more employees engage in a work stoppage to attend a rally together, the "concerted" requirement of section 7 protection is met.<sup>139</sup>

If no overt group work stoppage occurred at the workplace and the facts show that only one employee ceased work in order to attend the public rally, the issue of concertedness becomes more complex.<sup>140</sup> *Pace Motor Lines* makes clear that an individual non-union employee's action may be concerted when it can be viewed as part of "continuing group effort."<sup>141</sup> The employee attending an immigration rally may be able to show that his actions were part of past collective efforts if he can demonstrate other instances where he and his fellow employees had discussed immigration policy and how it affects their working conditions.<sup>142</sup>

Alternatively, *Meyers Industries* demonstrates that an individual employee's actions may be deemed "concerted" if he intended to incite future group action.<sup>143</sup> Under this theory, the employee might successfully argue that he wanted to attend the rally in order to learn about the goals of the movement in order to return to work and share the information with his fellow employees.<sup>144</sup>

*B. "Mutual Aid or Protection": The Work Stoppages and Immigration Rallies Must Be Related to Employees' Interests as Employees*

In order to determine whether an employee work stoppage and subsequent attendance at an immigration reform rally falls under the "mutual aid or protection" clause, the purpose of the work stoppage and atten-

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138. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 13-15 (1962); see also *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (2d Cir. 1942). In *Peter Cailler Kohler Swiss Chocolates Co.*, the Second Circuit emphasized the importance of worker solidarity:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of one the whom they are all then helping.

*Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d at 505.

139. See *Wash. Aluminum Co.*, 370 U.S. at 14; Morris, *supra* note 94, at 1703.

140. See Morris, *supra* note 94, at 1703.

141. *NLRB v. Pace Motor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983).

142. *Cf. id.*

143. *Meyers Indus. Inc.*, 281 N.L.R.B. 882, 887 (1986) ("We reiterate, our definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."), *aff'd* 835 F.2d 1481 (D.C. Cir. 1987).

144. *Cf. id.*

dance at the rally must have been sufficiently linked to a work-related issue that is shared by the involved employees.<sup>145</sup> In *Eastex*, the Supreme Court clearly announced that the “mutual aid or protection” clause should be interpreted broadly to include disputes outside of the direct relationship between the employer and employees.<sup>146</sup> As Professor Charles J. Morris explains, this broad interpretation is acceptable because “[t]he congressional intent, as well as the language, is quite clear. . . . When employees engage in concerted activity for an employment-related purpose, they are protected by the Act.”<sup>147</sup> Although this definition is wide-reaching, the *Eastex* Court indicated that an outer boundary of protection exists to prevent the activity from qualifying under the “mutual aid or protection” clause where the connection between the employees’ activity and the employees’ interest as employees is not sufficiently close.”<sup>148</sup> However, it has been left to the Board to determine where this outer boundary lies, and that point has yet to be explicitly defined.<sup>149</sup>

It is thus imperative to examine the goals of the immigration rally to determine whether the purpose of the work stoppage and attendance at the immigration reform rally are closely related to the “employees’ interests as employees” and should be protected.<sup>150</sup> Over one million employees engaged in work boycotts and attended rallies on May 1, 2006, for the purpose of lobbying legislators in favor of comprehensive immigration

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145. See Morris, *supra* note 94, at 1706; Burns, *supra* note 38, at 276-77 (“Recently, courts and the NLRB have construed the ‘mutual aid or protection’ phrase of section 7 so broadly that virtually all employee conduct meets this requirement. In most cases if an activity is ‘concerted,’ it will also be found to be for ‘mutual aid or protection’ . . . .”); Mingolla, *supra* note 79, at 407 (“[T]he Board stressed . . . that the ‘mutual aid or protection’ clause should be interpreted with regard to the relationship between the workers’ concerted activity and the improvement of their working conditions.”). But see Estlund, *supra* note 35, at 925 (arguing for an even broader interpretation of the mutual aid or protection clause); Daniel J. Herron, *Ten Years After Weingarten: Are the Standards Really Clear?*, 6 N. ILL. U. L. REV. 81, 88-89 (1986) (asserting that the *Eastex* Court left open the question of what activity constitutes protected concerted activity for mutual aid or protection).

146. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-65 (1978).

147. See Morris, *supra* note 94, at 1706. Morris explains that activities not within the specific language of the NLRA will still be protected, unless the nature of the activity restricts its protection according to one of the following factors:

(1) whether the object is unlawful or contrary to public policy, particularly the policy of the National Labor Relations Act; (2) whether and to what extent the employer has the capacity to control or affect the object of the activity; (3) whether the employer has a legitimate justification for limiting or preventing the conduct; and (4) whether the nature of the conduct taints its object.

*Id.* at 1705-06 (footnotes omitted).

148. *Eastex*, 437 U.S. at 567-68.

149. See *Tradesman Int’l Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002) (finding that the scope of section 7 protection is within the Board’s discretion); *Local 174, UAW v. NLRB*, 645 F.2d 1151, 1154 (D.C. Cir. 1981) (finding the task of defining the statutory language of section 7’s “mutual aid or protection” lies with the Board).

150. See *Eastex*, 437 U.S. at 567-68.

reform.<sup>151</sup> Though the connection between immigration reform and employee interests may not be immediately obvious, many argue that there is a close relationship between immigration status and working conditions.<sup>152</sup>

Several labor unions have determined that immigration reform is a means of raising labor standards for all workers.<sup>153</sup> For instance, the Service Employees International Union ("SEIU") considers immigration reform a spotlight issue.<sup>154</sup> The SEIU asserts that "our broken immigration system makes [improving workers' conditions of employment] harder to achieve," thus "driv[ing] down wages and benefit standards [and] breed[ing] division in workplaces and in our communities."<sup>155</sup>

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151. See Flaccus, *supra* note 4 (discussing the goals of the boycott, including "send[ing] the right message to Washington lawmakers considering sweeping immigration reform").

152. See, e.g., Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 285-86 (2006) (arguing that the political fallout from September 11, 2001, in addition to rising national concerns about illegal immigration and changes in federal immigration policy, contributed to the Supreme Court's anti-immigrant ruling in *Hoffman*); *Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing*, NATIONAL IMMIGRATION LAW CENTER IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002 (reviewing the Supreme Court's decision in *Hoffman* and predicting its negative effects on immigrant workers).

153. See Press Release, United Food and Commercial Workers, UFCW Statement on Immigration Reform (Apr. 10, 2006), available at [http://www.ufcw.org/press\\_room/index.cfm?pressReleaseID=231](http://www.ufcw.org/press_room/index.cfm?pressReleaseID=231) ("Immigration issues in the U.S. are part of a larger, global trend—the systematic exploitation of labor. Corporations export jobs in search of the most exploitable labor pool—and they import workers to create a domestic pool of exploitable labor. . . . Immigration reform must be comprehensive. A constructive immigration policy would respect and provide a legalization process for the millions of immigrant workers already contributing to our economy and society, while protecting wages and workplace protections for all workers. Anything less hurts all of us."); AFL-CIO, *Responsible Reform of Immigration Laws Must Protect Working Conditions for all Workers in the U.S.*, Mar. 1, 2006, available at <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec02272006e.cfm> ("Industries that cannot export jobs—such as those in construction—are attempting to use flawed immigration policies to import the labor standards of developing nations into the United States. The broken immigration system has allowed employers to create an underclass of workers, which has effectively reduced working standards for all workers. Immigrant workers are over-represented in the highest risk, lowest paid jobs, but the exploited immigrants do not work in isolation. U.S.-born workers who work side by side with immigrants suffer the same exploitation."). See generally Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089 (1999) (examining the role of Latino workers in the American workforce and how these employees may provide faltering labor unions with a means of survival).

154. See Service Employees International Union, <http://www.seiu.org/index.cfm> (last visited July 6, 2007) (posting a link to information on immigration reform at the top of the organization's homepage).

155. SEIU Maryland & District of Columbia, *Tell Your Senators: Support Immigration Reform that Improves Pay and Benefits for All Workers* (Apr. 3, 2006), [http://seiuaction.org/Seiumddc/alert-description.tcl?alert\\_id=1556921](http://seiuaction.org/Seiumddc/alert-description.tcl?alert_id=1556921). The SEIU leader-

Another proffered connection between immigration law and labor standards is that workers' undocumented status forecloses the availability of certain remedies under the NLRA.<sup>156</sup> *Hoffman* announced that undocumented workers are unable to receive backpay as a remedy for unfair labor practices committed against them.<sup>157</sup> While undocumented workers may continue to have rights under the NLRA, the lack of remedies available to the undocumented worker means the employer lacks any real incentive to respect these rights.<sup>158</sup> The proposed legislation that

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ship often releases statements expressing its perspective on immigration legislation and the effects of such legislation on workers. For example:

"We continue to welcome legislation that works to secure our borders and strengthen our economy by allowing hard-working, tax-paying immigrants to become both a legitimate part of our economy and full participants in our democracy.

All workers will benefit from legislation that provides common-sense rules and protections for immigrant workers and employers, protects workers' civil liberties and freedoms, allows immigrant families to stay together as they seek to legalize their status, clears backlogs, and creates a modernized border system."

Press Release, SEIU, Statement by SEIU Executive Vice President Eliseo Medina on President Bush's Immigration Proposal (Nov. 29, 2005), available at [http://www.seiu.org/media/pressreleases.cfm?pr\\_id=1270](http://www.seiu.org/media/pressreleases.cfm?pr_id=1270).

156. See discussion *supra* Part I.B.1; see also Garcia, *supra* note 152, at 318-26 (discussing the post-9/11 world of labor law and the detrimental effects of the *Hoffman* decision on immigrant workers).

157. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 146 (2002); see also National Employment Law Project, *Interamerican Court Condemns Discrimination on the Job Against Undocumented Workers*, Nov. 2003, <http://www.nelp.org/iwp/rights/organize/summich110303.cfm?bSuppressLayout=1&printpage=1> (reporting on the advisory opinion issued by the Interamerican Court of Human Rights after the government of Mexico requested that the court look into whether the *Hoffman* decision violates international human rights law). The article explains that the Interamerican Court of Human Rights issued an advisory opinion stating that the effect of *Hoffman* did violate human rights law, which asserts that labor rights are of fundamental importance to international migrant workers. National Employment Law Project, *supra*. Some of the basic labor rights cited by the court are:

the prohibition against forced labor, the prohibition and abolition of child labor, special attentions for women who work, rights that correspond to association and union freedom, collective bargaining, a just salary for work performed, social security, administrative and judicial guarantees, a reasonable workday length and in adequate labor conditions (safety and hygiene), rest, and backpay.

*Id.*; see also Press Release, AFL-CIO, AFL-CIO Files Complaint with United Nations ILO on *Hoffman Plastics* Supreme Court Decision Denying Immigrant Workers' Rights (Nov. 8, 2002), available at <http://www.aflcio.org/mediacenter/prsptm/pr11082002.cfm>. The AFL-CIO filed a complaint with the International Labor Organization of the United Nations, asserting that the U.S. Supreme Court's decision in *Hoffman* was a violation of international labor conventions. AFL-CIO, *supra*. The president of the AFL-CIO stated that "by allowing employers to unlawfully victimize undocumented workers without any economic consequence, the Court's decision undermines the living standards and working conditions of all Americans, citizens and noncitizens alike." *Id.*

158. See Rosenblum, *supra* note 40, at 25.

the immigrant community supports includes a path to documented status, which would result in fewer workers who lack full labor rights in the American workforce.<sup>159</sup>

Amy Taylor, the Immigration Project coordinator at the Drum Major Institute for Public Policy, commented on the motivation behind the recent partnership between labor unions and immigrant rights groups:

[N]ew labor leaders have taken a fresh look at the problem and realized the true source of wage depression and unfair labor competition is not immigrant workers themselves but rather a system of broken immigration laws. A two-tiered labor system has emerged from undocumented workers' inability to access full rights in the workplace.<sup>160</sup>

Taylor went on to explain how the undocumented workers' fear of deportation causes them to be more vulnerable to abuses by employers.<sup>161</sup> These workers are less willing to stand up to employers to demand equal pay or better working conditions because employers have the power to report their undocumented status to the government.<sup>162</sup>

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By failing to provide equal remedies to undocumented workers, these workers are more easily exploited and become cheaper to employ, which in turn creates an incentive for employers to recruit and hire undocumented workers. . . .

. . . [M]any employers feel emboldened to violate the rights of undocumented workers because there is little economic deterrent to discourage them from doing so . . . .

Because undocumented workers do not have full protection of the law and because they are in a particularly vulnerable position in relation to their employers due to their irregular immigration status, they are often willing to work for less pay and in less desirable working conditions.

*Id.*

159. See generally *Immigration Bills Compared: Highlights of the House and Senate and Border Security Measures*, *supra* note 3.

160. Amy Taylor, *Labor Joins La Marcha*, TOMPAINE, Sept. 8, 2006, [http://www.tompaine.com/articles/2006/09/08/labor\\_joins\\_la\\_marcha.php](http://www.tompaine.com/articles/2006/09/08/labor_joins_la_marcha.php).

161. *Id.*

162. See *id.*; see also Nicole Gaouette, *Latinos Walk Out Amid Firings*, L.A. TIMES, Nov. 18, 2006, at A16.

Hundreds of workers picketed the world's largest pork plant Friday after walking off the job to protest the company's firing of about 50 employees, all Latino, who were suspected of being illegal immigrants.

Officials at Smithfield Foods Inc. in Tar Heel, N.C., said they were forced to fire the workers because of stepped-up scrutiny by the Homeland Security agency responsible for work site enforcement.

But union organizers said the dismissals were part of a company campaign to intimidate workers agitating for better conditions. And Latino workers rallying outside the sprawling gray-and-white industrial complex complained that they had long suffered abusive treatment at the nonunion plant.

Gaouette, *supra*, at A16; see also, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 525 U.S. 137, 140 (2002) (undocumented workers discharged after becoming involved in union campaign); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-94 (1984) (employer threatened to report undocumented workers to INS when they supported a union organizing drive).

*C. Lawful Objective and Lawful Means: The Final Requirement of  
Section 7 Protection*

Employees who engaged in a work stoppage in order to attend an immigration rally acted in a “concerted” manner for the purpose of “mutual aid or protection” must still show the activity constitutes a lawful means to achieve a lawful objective in order to receive section 7 protection.<sup>163</sup> The employees’ purpose in stopping work and attending the rally on May 1, 2006, was to advocate comprehensive immigration reform.<sup>164</sup> The lawful objectives of the employee activity in both *Eastex* and *Kaiser Engineering*, in which employees acted for the purpose of changing legislation, demonstrate that gaining new immigration laws is a lawful objective under the NLRA.<sup>165</sup>

Additionally, the means the employees use to achieve this lawful purpose must not be “so offensive as not to merit protection of the statute.”<sup>166</sup> Case law makes clear that work stoppages other than a total strike may or may not constitute protected activity, depending on certain facts.<sup>167</sup> Thus, the lawfulness of work stoppages and attendance at immigration reform rallies depends upon whether these activities are more analogous to the unprotected partial or intermittent strikes that occurred in *Elk Lumber*<sup>168</sup> and *Blades Manufacturing*,<sup>169</sup> or if the activities should be protected like the employee actions in *A. Lasaponara*<sup>170</sup> and *McEver*.<sup>171</sup>

In the cases discussed previously, the courts and the Board identified factors that render concerted employee activity unprotected. Clearly, activity is unprotected if it involves violence or the destruction of property.<sup>172</sup> Concerted action may also be unprotected if employees are viewed as unilaterally setting the terms and conditions of their employment.<sup>173</sup> Furthermore, concerted employee activity is likely unprotected

163. See Morris, *supra* note 94, at 1702-08.

164. See *supra* note 5.

165. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-68 (1978); *Kaiser Eng’rs*, 213 N.L.R.B. 752, 752, 754-55 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976).

166. Morris, *supra* note 94, at 1707.

167. See discussion *supra* Part I.B.4.

168. *In re Elk Lumber Co.*, 91 N.L.R.B. 333, 337-38 (1950).

169. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1001-02, 1004-06 (8th Cir. 1965).

170. *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 996-98 (2d Cir. 1976).

171. *NLRB v. McEver Eng’g, Inc.*, 784 F.2d 634, 639 (5th Cir. 1986).

172. See *Johns-Manville Prods. Corp. v. NLRB*, 557 F.2d 1126, 1133 (5th Cir. 1977); Morris, *supra* note 94, at 1707-08; see also *supra* note 96.

173. See *Vencare Ancillary Servs., Inc. v. NLRB*, 352 F.3d 318, 322 (6th Cir. 2003) (ruling that choosing to perform some work tasks but refusing to perform others as a sign of protest is unprotected activity); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946) (holding that employees who refuse to perform certain job duties in solidarity with striking workers, while still receiving pay is unprotected activity); *In re Elk Lumber Co.*, 91 N.L.R.B. 333, 337 (1950) (slowing down work in response to a pay cut is unprotected).

if it is repetitious in nature,<sup>174</sup> or is intended to be extremely disruptive or harassing to the employer's business.<sup>175</sup>

Conversely, the courts and the Board have determined that a work stoppage involving a complete cessation of work and pay is protected.<sup>176</sup> Section 7 protection is also available if the concerted activity occurs only once or is of a short duration.<sup>177</sup> Additionally, concerted employee action may be protected by section 7 when the value of the employees' "legitimate work-related goal" outweighs the loss of production to the employer.<sup>178</sup>

The facts available indicate that the work stoppages to attend the national immigration rallies involved little to no reported violence or damage to property.<sup>179</sup> News reports from across the nation indicated that, on the day of the rallies, most employees either did not go to work at all or left work to attend a rally and did not return for the rest of the day.<sup>180</sup> In other words, the work stoppages were of brief duration, were mostly non-violent, and were not repetitive in nature.<sup>181</sup> Furthermore, news reports indicated that many employees told their employers in advance that they planned to attend a rally, while others offered alternative arrangements to make up the missed hours.<sup>182</sup> Employees who plan ahead and request time off cannot be viewed as calculating their work stoppage to disrupt

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174. See *Blades Mfg.*, 344 F.2d at 1005-06 (finding that three one-day walkouts in a short time period, in addition to threatened future walkouts, constituted unprotected concerted activity).

175. See *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1547-50 (1954) (stating that a series of hit-and-run strikes designed to confuse and harass the employer into a bargaining agreement was unprotected concerted activity).

176. See *McEver*, 784 F.2d at 639 (holding that a "one-time work stoppage of short duration," where employees cease receiving pay and walk off the job in order to protest working conditions, is protected).

177. See *id.* at 639 ("[A] brief, one-time strike is presumptively protected activity."); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976) ("The one day strike or work stoppage by the discharged employees in support of their petition . . . is statutorily protected . . .").

178. See *A. Lasaponara*, 541 F.2d at 998 ("Although it is true that not all concerted employee activities are protected by Section 7, the economic pressure brought to bear here . . . clearly failed to reach a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected and thereby justifies discharge of the participating employees." (citation omitted)).

179. See, e.g., *Balz & Fears*, *supra* note 1; *Flaccus*, *supra* note 4.

180. See *Flaccus*, *supra* note 4.

181. See *McEver*, 784 F.2d at 639 (explaining that partial strikes and repetitive work stoppages may not be protected); *A. Lasaponara*, 541 F.2d at 998 (distinguishing cases in which employees "deliberately inflict harm" on their employer from cases involving protected activity).

182. See, e.g., *Gross*, *supra* note 10.

production or pressure the employer into submission.<sup>183</sup> If the employee simply ceased work, did not receive pay for the time he missed, and was forthcoming to his employer about the absence, there is no indication that his work stoppages and attendance at the immigration rally demonstrates any of the characteristics of unlawful concerted activity.

There is one scenario, however, that may render otherwise-lawful work stoppages unprotected under section 7: In cases where an employee did not go to work on the day of the boycott but still received wages, through sick pay or otherwise, the activity may be unprotected because it constitutes a partial strike.<sup>184</sup> Because her behavior is likely unprotected, the employee could consequently be disciplined or discharged by the employer for either dishonesty or violating a company policy.<sup>185</sup>

### III. CASE LAW DEMANDS THAT WORK STOPPAGES AND ATTENDANCE AT IMMIGRATION RALLIES BE PROTECTED UNDER SECTION 7

Case law on each element of section 7 protection indicates that the employees who took part in work stoppages to attend immigration rallies engaged in protected “concerted activities for the purpose of . . . mutual aid or protection.”<sup>186</sup> First, the employee activity was clearly concerted: the sheer number of employees who took part across the country illustrates the kind of concertedness demanded by *Washington Aluminum* and its progeny.<sup>187</sup>

Second, the employee activity at issue demonstrates the requisite relationship to effecting change in working conditions to satisfy the “mutual

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183. Cf. *NLRB v. Blades Mfg.*, 344 F.2d 998, 1001-02 (8th Cir. 1965) (describing a strike calculated to affect the employers’ activity); *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1547-48 (1954) (illustrating “deliberately calculated” strategies aimed at “harassing the company”).

184. See Hodge, *supra* note 39, at 521-22 (unprotected concerted activity includes: employee disloyalty, disruption of work, partial strikes, etc.); Morris, *supra* note 94 (concerted activity may be unprotected “if the conduct violates law or policy”); see also discussion *supra*, part I.B.4.a.

185. See Advice Memorandum from Barry J. Kearny, Associate General Counsel, NLRB, to Irving E. Gottschalk, Regional Director, Region 30 (July 12, 2006), available at [http://www.nlr.gov/shared\\_files/Advice%20Memo/2006/30-CA-17442\(07-12-06\).pdf](http://www.nlr.gov/shared_files/Advice%20Memo/2006/30-CA-17442(07-12-06).pdf). In this memorandum generated by the NLRB, an unfair labor practice charge arising out of discipline of an employee who participated in the work stoppage and immigration rally is dismissed after the Board “conclude[s] that it is unnecessary to reach the issue of whether the employee’s attendance at the march encompassed protected activity because the Employer has established that it lawfully disciplined the employee for violating the Employer’s vacation policy and for dishonesty.” *Id.* If facts such as these are present, the employee’s activity is unprotected and therefore any employer discipline against such an employee would not be an unfair labor practice. See *id.*

186. 29 U.S.C. § 157 (2000); see also discussion *supra* Part I.B.

187. See Flaccus, *supra* note 4; see also discussion *supra* Parts I.B.2., II.A.



aid or protection" clause according to *Eastex* and *Kaiser Engineering*.<sup>188</sup> The employees engaged in these immigration rallies to effect reform in the immigration laws so that undocumented workers may attain legal immigration status.<sup>189</sup> As more immigrant workers achieve a documented immigration status, employers will no longer be able to take advantage of the weak labor rights of the undocumented labor force.<sup>190</sup> Consequently, changes in immigration legislation will result in higher wages, increased benefits, and improved working conditions to be enjoyed by immigrant and native-born employees alike.<sup>191</sup>

Third, a work boycott to attend an immigration rally is an activity that has a lawful objective. As previously discussed and illustrated by *Eastex* and *Kaiser Engineers*, the employee objective of changing national legislation is a legitimate, lawful objective that the NLRB has long recognized as protected.<sup>192</sup>

Finally, a work boycott to attend a national immigration rally is protected under section 7 as a lawful means of obtaining a lawful objective.<sup>193</sup> Factually, the concerted activities at issue here are analogous to the protected employee actions in *A. Lasaponara* and *McEver*.<sup>194</sup> Where, as here, workers engage in a complete work stoppage, they do not accept remuneration, and the stoppage is a brief and rare occurrence, case law demands that such concerted activity be protected.<sup>195</sup> Furthermore, using the balancing test set forth in *A. Lasaponara*, the employees' "legitimate work-related goal" of inducing immigration reform and improving the working conditions of millions of immigrant workers stands a good chance of outweighing the cost to the employer of one day of lost production.<sup>196</sup>

#### IV. CONCLUSION

The landscape of American labor law is changing. Formerly, the world of labor relations was populated by large American corporations, native-born blue-collar workers, and many strong unions. Today, employers of

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188. See discussion *supra* Part I.B.3.

189. See Balz & Fears, *supra* note 1.

190. See *supra* notes 156-62 and accompanying text.

191. See discussion *supra* Part II.B (describing the relationship and interconnectedness between immigrant workers and all other laborers in the U.S.).

192. See discussion *supra* Parts I.B.4, II.C.

193. See discussion *supra* Parts I.B.4.b., II.C.

194. See *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 636-38 (5th Cir. 1986); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 993-96 (2d Cir. 1976); see also discussion *supra* Parts I.B.4.b., II.C.; *NLRB v. Leprino Cheese Co.*, 424 F.2d 184, 186 (10th Cir. 1970) (holding that a one-day employee strike to protest working conditions, with intent to return to work the next day, was protected activity).

195. See discussion *supra* Parts I.B.4.b., II.C.

196. See *A. Lasaponara*, 541 F.2d at 998.

all sizes employ increasing numbers of undocumented immigrant workers and union membership is at its lowest ebb. In response to this new reality, American labor laws must adapt in order to maintain the value and relevance of the NLRA for all. By recognizing the protected nature of these work stoppages to attend the immigration rallies, the NLRB will take an important step forward in preserving the labor rights of all people who are hard at work in the United States today.

